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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1393

THOMAS E. SINGLETON, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.,
and
MICHAEL FREIMAN, M.D.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

In Opposition to "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit"

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TABLE OF CITATIONS

Page

Cases

Doe, et al. v. Bolton, et al., 410 U.S. 179 (1973) 4

Doe, et al. v. General Hospital of the District of Columbia, et al., 313 F.Supp. 1170 (D.D.C. 1970), affirmed, 434 F.2d 423 (D.C.C. 1970), and affirmed, 434 F.2d 427 (D.D.C. 1970) 4

Doe, et al. v. Hale Hospital, et al., 500 F.2d 144 (1st Cir. 1974), cert. denied, 42 L.Ed.2d 837 (1975) 4

Doe v. Mundy, et al., 378 F. Supp. 731 (D. Wis. 1974), affirmed without published opinion, 510 F.2d 976 (7th Cir. 1975) 4

Doe, et al. v. Myatt, et al., — F.Supp. — (D.N.D., No. A3-74-48, Jan. 27, 1975) 4

Doe, et al. v. Poelker, etc., et al., dismissed for lack of standing, — F.Supp. — (E.D. Mo., No. 73C565(A), Mar. 22, 1974), reversed, 497 F.2d 1063 (8th Cir. 1974), dismissed on the merits, — F.Supp. — (E.D. Mo., No. 73C565(A), Jan. 13, 1975), reversed on the merits, — F.2d — (8th Cir., No. 75-1069, Apr. 14, 1975) 4, 5

Doe v. Rampton, et al., 366 F.Supp. 189 (D.Utah 1973) 3

Doe, et al. v. Rose, etc., 380 F.Supp. 779 (D. Utah 1973), affirmed, 499 F.2d 1112 (10th Cir. 1974) 3

Doe, et al. v. Westby, et al., 383 F.Supp. 1143 (D.S.D. 1974), vacated and remanded on other grounds, 43 L. Ed. 2d 648 (1975) 3-4

Doe, et al. v. Wohlgemuth, et al., 376 F.Supp. 173 (W.D. Penn. 1974), vacated and remanded on other grounds, 505 F.2d 186 (3rd Cir. 1974) 3

Klein, et al. v. Nassau County Medical Center, et al., 347 F.Supp. 496 (E.D. N.Y. 1972), affirmed sub nom. Ryan, etc. v. Klein, et al., 412 U.S. 924 (1973) 3

Nyberg, et al. v. The City of Virginia, et al., 495 F.2d 1342 (8th Cir. 1974), cert. denied, 42 L.Ed. 2d 136 (1974) 4

Orr, et al. v. Koefoot, et al., 377 F.Supp. 673 (D.Neb. 1974) 4

Planned Parenthood of Central Missouri, et al. v. Danforth, et al., — F.Supp. — (E.D. Mo., No. 74-416 (C)(A), Jan. 31, 1975), stayed and enjoined, 43 L.Ed. 2d 389, No. A-656, Feb. 18, 1975 5

Roe, et al. v. Ferguson, 389 F.Supp. 387 (S.D. Ohio 1974), — F.2d — (6th Cir., No. 74-2195, April 28, 1975) 2, 3

Roe, et al. v. Norton, et al., 380 F.Supp. 726 (D.Conn. 1974) 3

Roe, et al. v. Wade, 410 U.S. 113 (1973) 4

Santiago v. Colon, et al., — F.Supp. — (D.P.R., No. 74-362, Aug. 6, 1974) 4

Word, et al. v. Poelker, etc., et al., dismissed on ground of absention, — F.Supp. — (E.D.Mo., No. 73C533 (2), Oct. 4, 1973), reversed on the merits, 495 F.2d 1349 (8th Cir. 1974) 4

Wulff, et al. v. Singleton, 380 F.Supp. 1137 (E.D. Mo. 1974), 508 F.2d 1211 (8th Cir. 1974) 2, 3, 4

Statute

28 U.S.C., Section 2281 2

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Respondents, GEORGE J. L. WULFF, JR., M.D., and MICHAEL FREIMAN, M.D., respectfully submit this supplemental brief in direct opposition to "Petitioner's Supplemental Brief", served upon respondents this sixth day of June, 1975.

Respondents suggest that the new and additional ground advanced by petitioner for the granting by this Honorable Court of petitioner's Writ of Certiorari (based upon an alleged conflict of decisions between the circuit courts of appeal in *Wulff*, et al. v. *Singleton*, 508 F.2d 1211 [8th Cir. 1974] and *Roe*, et al. v. *Ferguson*, — F.2d — [6th Cir., No. 74-2195, April 28, 1975]) lacks merit and is premised upon a misreading and misapplication of the latter holding. (A copy of the, as yet unreported, decision in *Roe, supra*, has been appended to petitioner's supplemental brief and page references herein to *Roe, supra*, are to said appendix page numbers.)

Wulff, supra, and *Roe, supra*, appear at first blush to contain common elements of facts and circumstances; but, in fact, their procedural and legal groundings are dramatically opposite and conflicting. The resulting opinions are confluent and not contrary.

Plaintiffs' complaint in *Wulff, supra*, challenged the statute solely upon grounds of constitutional infirmities (*Wulff, supra*, at p. 1212). Plaintiffs' complaint in *Roe, supra*, challenged the statute both upon grounds of constitutional infirmities and upon grounds of conflicts with federal legislation (*Roe, supra*, at p. A-3).

The district court proceedings in *Wulff, supra*, were before a three-judge panel, pursuant to 28 U.S.C., Section 2281 (*Wulff, supra*, 380 F.Supp. 1137 [E.D.Mo. 1974]), while the district court proceedings in *Roe, supra*, were before a single district court judge (*Roe, supra*, 389 F.Supp. 387 [S.D. Ohio 1974]).

The appellate court in *Roe, supra*, while disagreeing with the appellate court in *Wulff, supra*, as to whether "the unconstitutionality of this type of statute is so 'obvious and patent' as to obviate the need for a three-judge court" (*Roe, supra*, at p. A-10) merely remanded for convening of a three-judge panel; inasmuch

as the district judge had previously determined "that the constitutional claim is not frivolous nor insubstantial" (*Roe, supra*, at p. A-11). As the appellate court noted, "the issue of substantiality is one to be determined in the first instance by the district judge in whose court the complaint is filed" (*Roe, supra*, at p. A-11).

Respondents respectfully suggest that the only conflict that may exist, if any, is between the appellate court in *Wulff, supra*, and the district court judge in *Roe, supra*, as to substantiality of the claim. Even if the appellate court decision in *Roe, supra*, may be construed to be at odds with the appellate court decision in *Wulff, supra*, as to the substantiality of the constitutional claim, this is not the nature of circuit conflict which merits consideration by this Honorable Court. The circuit panels may also be interpreted as disagreeing on the propriety of deciding the constitutional merits on appeal; but this is a matter of appellate discretion based upon the then prevailing circumstances and factors.

The appellate court in *Wulff, supra*, painstakingly and correctly set forth the principles which prompted it to decide the case on the merits (*Wulff, supra*, at pp. 1214-1215). The appellate court in *Wulff, supra*, had before it the identical and the unanimous line of decisions in *Klein*, et al. v. *Nassau County Medical Center*, et al., 347 F.Supp. 496 (E.D. N.Y. 1972), *affirmed sub nom. Ryan*, etc. v. *Klein*, et al., 412 U.S. 924 (1973), *Doe*, et al. v. *Rose*, etc., 380 F.Supp. 779 (D. Utah 1973), *affirmed*, 499 F.2d 1112 (10th Cir. 1974), *Doe* v. *Rampton*, et al., 366 F.Supp. 189 (D.Utah 1973), *Doe*, et al v. *Wohlgemuth*, et al., 376 F.Supp. 173 (W.D.Penn. 1974), *vacated and remanded on other grounds*, 505 F.2d 186 (3rd Cir. 1974), *Roe*, et al. v. *Norton*, et al., 380 F.Supp. 726 (D.Conn. 1974) and *Doe*, et al. v. *Westby*, et al., 383 F.Supp. 1143 (D.S.D. 1974), *vacated and remanded on other grounds*, 43

L.Ed. 2d 648 (1975). Since the appellate court opinion in *Wulff, supra*, on December 31, 1974, one additional case reaching the identical conclusion was decided (*Doe*, et al. v. *Myatt*, et al., — F.Supp. — [D.N.D., No. A3-74-48, Jan. 27, 1975).

In addition, the appellate court had before it a host of public hospital cases, which although presenting a slightly different factual context, all unanimously supported the identical, equal protection issue on abortion, as decided in *Wulff, supra*. (See, *e.g.*: *Doe*, et al. v. *General Hospital of the District of Columbia*, et al., 313 F.Supp. 1170 [D.D.C. 1970], *affirmed*, 434 F.2d 423 [D.C.C. 1970], and *affirmed*, 434 F.2d 427 [D.D.C. 1970], *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 [8th Cir. 1974], *cert. denied*, 42 L.Ed. 2d 136 [1974]; *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 [1st Cir. 1974], *cert. denied*, 42 L.Ed.2d 837 [1975]; *Doe* v. *Mundy*, et al., 378 F. Supp. 731 [D. Wis. 1974], *affirmed without published opinion*, 510 F.2d 976 [7th Cir. 1975]; *Santiago* v. *Colon*, et al., — F.Supp. — [D.P.R., No. 74-362, Aug. 6, 1974]; and *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 [D.Neb. 1974]).

Since the appellate court decision in *Wulff, supra*, one additional case reaching the identical conclusion was decided (*Doe*, et al. v. *Poelker*, etc., et al., — F.2d — [8th Cir., No. 75-1069, Apr. 14, 1975]).

Lastly, bearing upon the appellate court's decision was the continuing irreparable harm to respondents' indigent patients, particularly in light of the history of abortion litigation within the United States District Court for the Eastern District of Missouri, Eastern Division, subsequent to *Roe*, et al. v. *Wade*, 410 U.S. 113 (1973) and *Doe*, et al. v. *Bolton*, et al., 410 U.S. 179 (1973). See, *e.g.*: *Word*, et al. v. *Poelker*, etc., et al. [municipal regulation of abortion clinics], *dismissed on ground of absention*, — F.Supp. — [E.D.Mo., No. 73C533(2), Oct. 4, 1973], *reversed on the merits*, 495 F.2d 1349 [8th Cir. 1974];

Doe, et al. v. *Poelker*, etc., et al. [public hospitals' prohibition on abortion], *dismissed for lack of standing*, — F.Supp. — [E.D. Mo., No. 73C565(A), Mar. 22, 1974], *reversed*, 497 F.2d 1063 [8th Cir. 1974], *dismissed on the merits*, — F.Supp. — [E.D. Mo., No. 73C565(A), Jan. 13, 1975], *reversed on the merits*, — F.2d — [8th Cir., No. 75-1069, Apr. 14, 1975]. The present cause was dismissed for lack of standing, 780 F.Supp. 1137 [E.D.Mo. 1974] and reversed on the merits at 508 F.2d 1211 [8th Cir. 1974]. Subsequently there has been the experience of *Planned Parenthood of Central Missouri*, et al. v. *Danforth*, et al. [upholding constitutionality of state statute], — F.Supp. — [E.D. Mo., No. 74-416 (C)(A), Jan. 31, 1975], *stayed and enjoined*, 43 L.Ed. 2d 389, No. A-656, Feb. 18, 1975).

Under all of the facts, circumstances, equities and law, duly considered by the appellate court herein below, it acted correctly and properly.

Accordingly, respondents respectfully pray that petitioner's "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit" be denied forthwith.

Respectfully submitted,

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Certificate of Service

I, the undersigned attorney for respondents and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33 I have caused to be served true and correct copies of the foregoing "Respondents' Supplemental Brief in Opposition to 'Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit' " upon each party required to be so served, by depositing said copies in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to The Honorable John C. Danforth, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101 and to Mr. Michael L. Boicourt, Assistant Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101, Attorneys for Petitioner, all this sixth day of June, 1975.

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